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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

(1)

No. 803 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF  
THE DENVER AND RIO GRANDE WESTERN RAILROAD COM-  
PANY, A CORPORATION, AND THE DENVER & RIO GRANDE  
WESTERN RAILROAD COMPANY, A CORPORATION,

*Petitioners,*

*vs.*

E. E. BRUNER.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF UTAH AND  
BRIEF IN SUPPORT THEREOF.

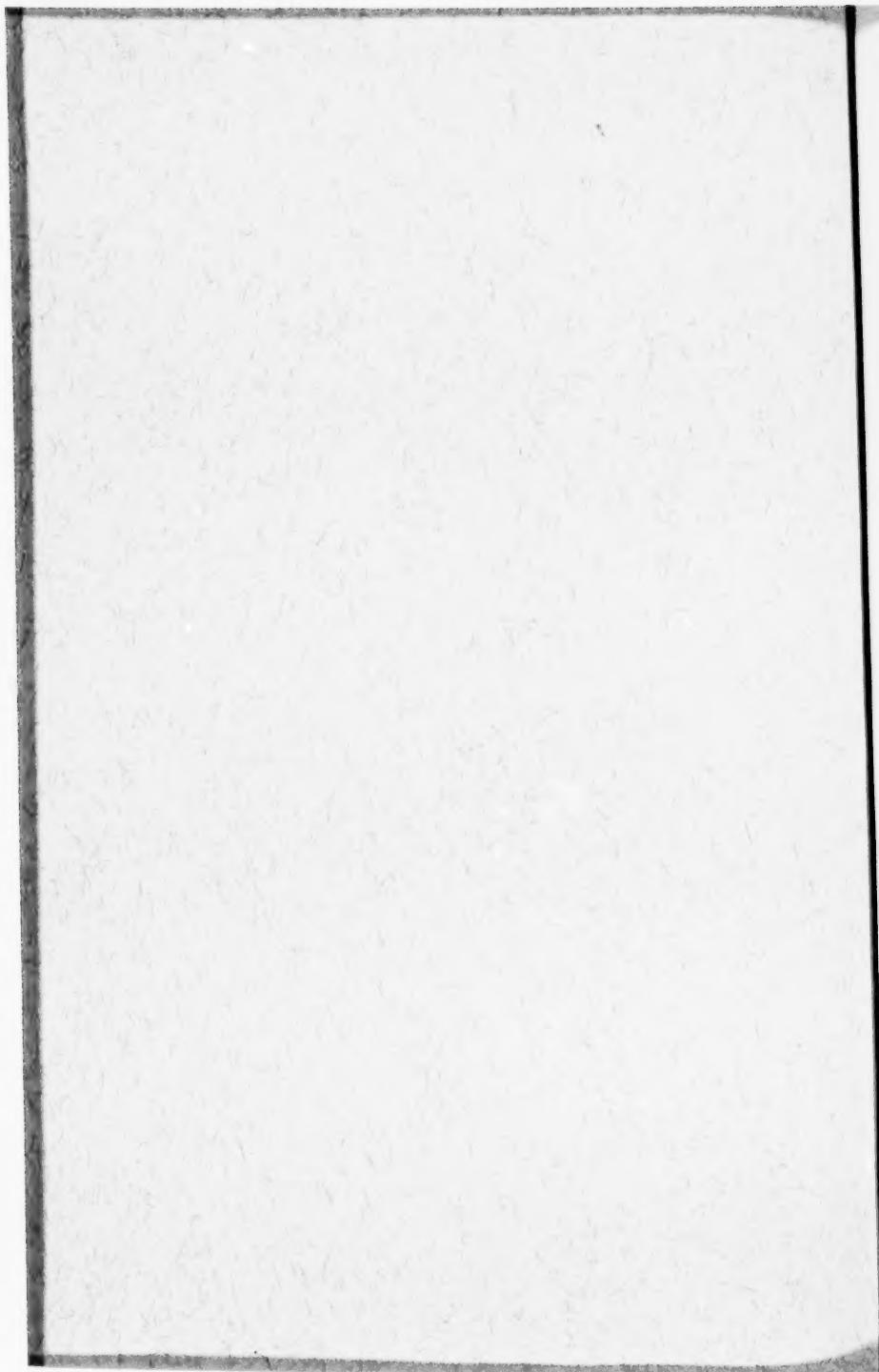
P. T. FARNSWORTH, JR.,

W. Q. VAN COTT,

*Counsel for Petitioners.*

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*vs.*

E. E. BRUNER.

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF UTAH AND  
BRIEF IN SUPPORT THEREOF.**

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*To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

The petition of Wilson McCarthy and Henry Swan,  
Trustees of The Denver and Rio Grande Western Railroad  
Company, and The Denver and Rio Grande Western Rail-  
road Company respectfully shows:

**Summary and Short Statement of Matter Involved.**

The Supreme Court of Utah, by a divided opinion, in a  
case arising under the Federal Employers Liability Act,

has held as matter of law that plaintiff and respondent, E. E. Bruner (hereinafter called "Bruner") was not guilty of contributory negligence and that defendants and petitioners (hereinafter called the "Railroad") were guilty of negligence, which was a proximate cause of the accident.

The Railroad contends that the evidence and tendencies of the proof were conflicting and such that the issues of negligence on the part of the Railroad and contributory negligence on the part of Bruner should not have been decided as matter of law and that to do so violated the principles of law announced by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 446, 63 S. Ct. 444; *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062; *Owens v. Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1221, 63 S. Ct. 1271, and *Brady v. Southern Railway Co.*, No. 26, Oct. Term, 1943, decided December 20, 1943, 64 S. Ct. 232. In those cases this Court held that questions should not be decided as matter of law where the evidence and tendencies of the proof are conflicting and that to withdraw them is violative of the rights of the employees or their dependents. It is submitted that the rule must work both ways and that it is also violative of the employer's rights to decide such questions as matter of law.

#### **Jurisdictional Statement.**

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. Section 344.

(b) The statutes of the United States applied by the

Supreme Court of Utah are 45 U. S. C. Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(e) The judgment of the Supreme Court of Utah was rendered on October 25, 1943 (R. 117). The petition for rehearing was denied on December 27, 1943 (R. 117). This petition for certiorari was filed March 18, 1944.

#### **Questions Presented.**

The questions presented are whether the Supreme Court of Utah properly applied the United States statutes commonly called the Federal Employers Liability Act, or whether the application made by it is inconsistent with the applicable decisions of the Supreme Court of the United States, in that the Utah Court has held, by a divided court, in a case wherein the evidence and tendencies of the proof are conflicting, as matter of law, that Bruner was not guilty of contributory negligence and as matter of law that the Railroad was guilty of contributory negligence.

#### **Reasons Relied On for Allowance of Writ.**

The Supreme Court of Utah has decided a question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. If issues of negligence and contributory negligence are to be withdrawn from the consideration of juries under facts and circumstances such as are involved in this case, then a vast number of similar issues of negligence and contributory negligence will be withdrawn from juries at the instance of plaintiffs and defendants in cases arising under the Federal Employers Liability Act.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued by this Court to the Supreme Court of

Utah to the end that the judgment of said Court may be reviewed by this Honorable Court.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

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